88-1536

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JAMES CHRISTIAN BOBO,
MARGARET FALL HARPER,
DAVID RAY MARSHALL,
MARJORIE NELSON,
LEON SPIVEY,
JOHN DALTON WITTE,

Petitioners,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals rejected properly Petitioners' "underlying challenge" to *Roe v. Wade*, 410 U.S. 113 (1973), such challenge being a collateral attack against *Roe* on constitutional and jurisdictional grounds;

2. Whether this Court should reconsider and overrule *Roe* as violative of the U.S. Constitution and of fundamental principles of personal jurisdiction; and

3. Whether, in the alternative to granting of the Petition for a Writ of Certiorari herein, the Court should hold the Petition for disposition until after the Court decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605, probable jurisdiction noted on January 9, 1989.

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OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. 1-19) is reported at 757 S.W. 2d 58.

JURISDICTION

The Judgment of the Court of Appeals was dated and entered on July 28, 1988 (Pet. App. 1, 19). A timely motion for rehearing was overruled by that Court on September 22, 1988. On December 21, 1988, the Court of Criminal Appeals of Texas refused Petitioners' Joint Petition for Discretionary Review (Pet. App. 30-32). A timely joint motion for rehearing was denied by that Court on January 18, 1989 (Pet. App. 33-35). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION:

5th Amendment:

> * * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *.

14th Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

By Informations filed in County Criminal Court at Law No. 5 of Harris County, Texas ("Trial Court"), Petitioners were charged with criminal trespass of a certain building in Harris County, Texas, by entering and remaining in the building after receipt of notice to depart, in violation of *Tex. Penal Code,* § 30.05. The building in question was the West Loop Clinic, which is an abortion clinic located in Houston, Harris County, Texas ("Clinic").

Following a joint trial by a 6-person Jury in April 1987, Petitioners were found guilty as charged. The Jury fixed punishment of varying fines and jail sentences, but recommended that the jail times be probated for 180 days each. The Trial Court sentenced Petitioners in accordance therewith, imposing fines which were not probated and jail sentences which were probated.[1]

On appeal, the Court of Appeals reformed all such Judgments in a manner not here pertinent and affirmed, as reformed, all such Judgments (Pet. App. 20). The Court of Criminal Appeals refused Petitioners' Joint Petition for Discretionary Review and denied subsequently their timely joint motion for rehearing.

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[1] The precise sentences were: Petitioner Bobo, $1,000.00 fine and jail sentence of 180 days; Petitioners Marshall and Spivey, $850.00 fine each and jail sentences of 120 days each; Petitioners Harper, Nelson and Witte, $650.00 fine each and jail sentence of 90 days each. All jail sentences were probated for 180 days. The probations contained conditions not here pertinent.

The pertinent facts are these:

A. *Certain Trial Evidence.* About 7:45 a.m. on September 20, 1986, Petitioners and others entered the Clinic. Some of them wore black arm bands and carried chains. Some chained themselves or were chained to chairs (in the waiting room). The front door of the clinic was chained from the inside, and a van belonging to Petitioner Witte was parked up against an emergency exit. People, however, entered or squeezed through such exit, and an employee of the Clinic slipped easily through the front door. Members of the group remained primarily in the waiting room or lobby area. Some or all of them sang, chanted or banged on the walls. Some prayed. In the meantime, a "large crowd" was outside the Clinic "chanting, hollering, screaming, carrying signs, and several representatives of the news media were there also" (S.F. 434). A television camera crew was inside the Clinic. Petitioners and 12 others were arrested by Houston Police Officers when they remained after having been told to leave by the Clinic Director and some Officers.

Twelve patients were scheduled for "procedures" that morning (S.F. 24). Procedures were halted or not performed because of what was going on in the Clinic and because the emergency exit was blocked (S.F. 54, 95).

B. *Certain Defensive Matters.* Shortly after the State rested its case-in-chief, defense counsel said that "we would like to have a ruling from the Court on our trial briefs on the defense of necessity", that "we need some guidance from the Court as to whether we would be allowed to put on the evidence that would sustain the necessity and justification defense", and that, "[i]f not, then we need to make a bill of exceptions" (S.F. 504, 505). The Court replied (S.F. 505)

> Mr. Bennett, the court is not going to allow you as to these defenses. If you would like to make a bill, you may proceed.

Subsequently, Petitioners testified on bills of exceptions – made outside the presence of the Jury and *after* the Jury had returned verdicts of guilty as to all of them (S.F. 619).

Their bills of exceptions included the following: To the question, "Did you form the belief or the opinion that the only way to alleviate this emergency situation was to trespass in order to save the lives of the mothers and babies", *Harper* answered, "Yes, I did. If we had not, they would have been killed directly" (S.F. 627-628). To the question, "Is it your opinion that you had to trespass in order to save the lives of those babies and mothers at the abortion clinic", *Spivey* answered, "Absolutely" (S.F. 634). To the question, "Did you form the opinion that it was a necessity to trespass at the clinic in order to save the women and their babies from abortion", *Witte* answered, "Yes, I did" (S.F. 645). On cross-examination, *Witte* said that lives were saved that day (S.F. 650). *Bobo* said that he believed that there needed to be time for the women to consider their actions and to be educated on what they were doing, that he believed that "under the Constitution we are pledged to protect each other and keep each other from harm", that he did not intend to break the law but intended to obey the greatest law of love thy neighbor as thyself (S.F. 657-659). *Marshall* said that he did not believe he trespassed because he "went there to save lives and to prevent mothers from being harmed by abortion procedures" (S.F. 662). To the question, "Was it your opinion that it was necessary to stay in the inner office of the abortion clinic in order to save those lives [mothers and

their unborn children]", *Nelson* said, "Well, I wasn't actually in the inner office. I was in the reception area; and, yes, it is" (S.F. 665-666).

At the conclusion of the bills, defense counsel said "[j]ust for the record, we would like to reoffer all six individuals in our case in chief on the issue of necessity and justification" (S.F. 667). The Trial Court noted the same (S.F. 667).[2] Earlier in the trial, defense counsel submitted four special instructions – three on the defense of third person and one on the defense of necessity (e.g., Tr. Bobo 82-90). These were not included in the Trial Court's instructions to the Jury, and defense counsel's objections in such regard (S.F. 543) were overruled (e.g., Tr. Bobo 91; see S.F. 548).

C. *Federal Questions.* The defense of third person requires that the third person for whom the actor intervenes be subjected to *unlawful* force or *unlawful* deadly force (*Tex. Penal Code*, § 9.33). As shown above, the Jury did not hear substantial defensive evidence.

On appeal, Petitioners contended, *inter alia*, that the evidence on Petitioners' Bills of Exceptions (Nos. 5

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[2] Earlier, the Trial Court denied the offer of Harper's testimony (S.F. 632) and either did not rule or noted the offers as to Witte, Marshall and Nelson (S.F. 654, 664, 667). The testimony of Spivey was offered after redirect examination (S.F. 634), in which the Court did not rule, but not after recross examination (S.F. 640-641). As for Bobo, the Court denied the evidence at that time and, in response to an "earlier comment" that the Court prevented him from testifying, said that it believed that "the Court only prevented him from testifying as to the necessity defense and as to harm" (S.F. 660). Actually, Bobo admitted that he understood that the Court had ruled that he could not testify "as to the defense of justification" (S.F. 656).

through 10) "made out the defense of necessity and of third person"; that they "were entitled as of constitutional right to defend themselves against the charges"; that since those defenses were provided under Texas law they "were entitled to raise and support them"; and that the "Trial Court had no authority to deny such right, and, when it did, it disregarded its obligation to protect their constitutional right to a fair trial" (Brief of Appellants in *Bobo et al. v. Texas*, Tex. App. 14th Dist., pp. 34, 35). They claimed that the force of abortion to which the unborn children at the clinic were subjected was unlawful for three reasons. One such reason was that abortion was unlawful under the Texas anti-abortion laws which this Court purported to hold unconstitutional in *Roe*, and that such laws are still in effect because *Roe* itself is void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction.[3]

The Court of Appeals rejected Petitioners' "underlying challenge" to *Roe* (Pet. App. 8-9).[4] Petitioners challenged such action before that Court (on Motion for Rehearing) and before the Court of Criminal Appeals (on Application for a Writ of Error and on Joint Motion for Rehearing). Such challenges were unsuccessful.

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[3] For the text of former *Tex. Penal Code* arts. 1191-1194, 1196, see *Roe*, 410 U.S. at fn. 1, p. 117.

[4] The Court believed that Petitioners premised their contentions "concerning both justification defenses on the purported invalidity of *Roe v. Wade*, * * * " (Pet. App. 8). Petitioners' claims concerning the defense of necessity were not so premised. Further, only *one aspect* of the defense of third person advanced by Petitioners on appeal (and as presented in this Petition) challenged *Roe* collaterally.

The alternative question (no. 3) to the granting of the Petition, i.e., whether this Court should hold the Petition for disposition until after it decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605, probable jurisdiction noted on January 9, 1989, was not raised below. It is a matter strictly for this Court.

ARGUMENT

I.
THE COURT OF APPEALS ERRED WHEN IT REJECTED PETITIONERS' COLLATERAL ATTACK ON *ROE V. WADE*

The Court of Appeals erred when it rejected Petitioners' "underlying challenge" to *Roe* (Pet. App. 8-9). It did this without even considering the merits of Petitioners' collateral attack against *Roe*. As shown in Section II of this Petition, however, such attack is valid, and *Roe* is void as violative of the U.S. Constitution and of fundamental primciples of personal jurisdiction.

This rejection was critical to establishment of the unlawful force element of the defense of third person, *Tex. Penal Code*, § 9.33. The Court of Appeals stated subsequently that "[s]ince it is undisputed that the clinic was a licensed pregnancy termination facility, nothing in any of the bills could support findings that either clinic's procedures, or the mothers' seeking the procedures, amounted to *unlawful* force or *unlawful* deadly force" (Pet. App. 11). (Emphasis in original.)

Moreover, such rejection aided the Court in holding that an "unborn fetus" was not a "person" under such

defense.[5] The Court pointed to *Roe's* nonpersonhood holding for the unborn under the 14th Amendment to further its above holding and to enhance its interpretation of *Tex. Penal Code*, § 9.33 (Pet. App. 11):

> * * * Moreover, with respect to the alleged harm to the unborn, "the word 'person,' as used in the Fourteenth Amendment does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). Similarly, because TEX. PENAL CODE ANN. § 1.07(a)(27) defines "person" as "an individual, corporation, or association," while § 1.07(a)(17) defines "individual" as a "human being who has been born and is alive," an unborn fetus is not a "person" for purposes of the defense of third persons defense. *Ogas v. State*, 655 S.W. 2d 322, 325 (Tex. App. – Amarillo, 1983, no pet.).

In light of the abortion right of *Roe* and the exclusion of the unborn from the meaning of "third person," the Court of Appeals concluded that, "[t]herefore, there is no

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[5] The noun, "third person", is not defined in the *Texas Penal Code*. hence resort to the Code Construction Act, *Vernon's Tex. Civ. Stat. Ann.* art. 5429b-2, was in order. *Tex. Penal Code*, § 1.05(b). Had the common usage or understanding standard of that Act been applied, "third person" would have included a pregnant female *and* her unborn child. See *Webster's Third New International Dictionary of the English Language, Unabridged* (G & C Merriam Co., Springfield, Mass.) (1971), pp. 1686 ("person" as an individual human being) and 388 ("child" as an "*unborn* or recently born *human being*"). (Emphasis added.) This construction squares also with justice, which is an object of such Code [*Tex. Penal Code*, § 1.05(a)], and with legal realities. The Court's use of the definitions of "person" and "individual", *Tex. Penal Code*, § 1.07(a)(27) and (a) (17), respectively, as used in *Ogas v. State*, 655 S.W. 2d 322, 325 (Tex. Amarillo, 1983, no pet.), was misplaced and erroneous. At any rate, it remains an open question of how the Court of Appeals at bar would have construed "third person" *absent Roe v. Wade*.

showing that appellants could 'protect' the unborn fetuses from purported harm from either the clinic itself, or their own mothers, within the meaning of § 9.33" (Pet. App. 11). In short, *Roe* was an extremely important consideration to the Court of Appeals in its interpretation of the *Texas statutory* defense of third person.

II.

ROE V. WADE SHOULD BE OVERRULED AS VIOLATIVE OF THE U.S. CONSTITUTION AND FUNDAMENTAL PRINCIPLES OF PERSONAL JURISDICTION

A. *Threshold Matters.* At the threshold, it is well established that if a court in the United States violates the U.S. Constitution in a proceeding before it, *it loses jurisdiction to proceed to judgment,* and any "judgment" which it might enter would be *void.* See *Johnson v. Zerbst,* 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh,* 93 U.S. 274, 277-284 (1876). This Court is capable of violating the U.S. Constitution. See *Erie R. Co. v. Tompkins,* 304 U.S. 64, 77-78, 79-80 (1938), where the Court even *admitted* that it and lower federal courts had done so with application of the doctrine of *Swift v. Tyson,* 16 Pet. 1 (1842). Compare *Plessy v. Ferguson,* 167 U.S. 537 (1896), with *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954). Since it is difficult at best to amend the Constitution, the Court should be sensitive to calls for re-examination under appropriate circumstances. See *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting).

B. *Roe v. Wade Violates the U.S. Constitution and Fundamental Principles of Personal Jurisdiction.* Petitioners submit respectfully that *Roe* should be overruled as violative of the U.S. Constitution and fundamental principles of personal jurisdiction. Supportive positions are presented below.

1. *No Representation.* Neither abortion "survivor" children nor unborn children threatened and endangered by abortion were represented before the U.S. District Court or this Court in *Roe*. Abortion "survivor" children born in this country are U.S. citizens (with extremely minor exceptions), yet they are doomed to die and die primarily due to prematurity, abortional injury or lack of care. Unborn children, with well recognized legal postures under the laws of the United States, Texas, and other States, are killed outright by abortion. Abortion "survivors" and unborn children are persons or entities with legal personalities under the Due Process Clause of the 5th Amendment to the U.S. Constitution. The Judgments of the U.S. District Court and this Court in *Roe*, rendered without any representation of such victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivations of life, liberty and property without due process of law, in violation of such 5th Amendment. Accordingly, such Judgments are unconstitutional and void as to them. See U.S. Const., 5th Amendment (Due Process Clause); *McArthur v. Scott*, 113 U. S. 340, 391-392, 404 (1885) (unborn Children); *Pennoyer v. Neff*, 95 U.S. 714, 733-734 (1878) (U.S. Citizens); Rule 19, *F.R. Civ. Proc.*

2. *No Personal Jurisdiction.* Neither the U.S. District Court nor this Court had personal jurisdiction over such

abortion "survivor" children or unborn children in *Roe*. Yet such children were affected vitally by those proceedings, and had a right to be before the Courts through next friends or guardians (or by counsel for such guardians or next friends). The Judgments of such Courts, therefore, were unconstitutional and void as to them. *Ibid.*

Moreover, this deficiency operated to divest the U.S. District Court and this Court of authority to pronounce judgment affecting them personally. Neither the unborn children who were conceived and killed by abortion after *Roe* nor the abortion "survivor" children after *Roe* could be affected jurisdictionally by *Roe* in their rights posture, yet they die from *Roe*. The Judgments of such Courts, rendered without personal jurisdiction over such infant victims, are void as violative of fundamental principles of personal jurisdiction. See *McArthur v. Scott, supra,* 113 U.S, at 391-392, 404; *Pennoyer v. Neff, supra,* 95 U.S. at 733-734.

3. *Invidious Discriminations*. The discriminations perpetrated in *Roe* against abortion "survivors" and unborn children as compared to the nonaborted born and corporations are invidious and deprive such children of life, loberty and property without due process of law, in violation of the 5th Amendment to the U.S. Constitution. Corporations, which are artificial beings and not mentioned in the constitution, are "persons" under the Due Process Clause of such 5th Amendment and under the Due Process and Equal Protection Clauses of the 14th Amendment thereof, while actual unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are denied such personhood. A prematurely born child of 7-month gestational age has 14th

Amendment personhood while an older and more developed unborn child of 8-months gestational age does not. Such crazy quilt discriminations are violative patently of due process under such Amendment.

4. *Failure To Apply Levy v. Louisiana, 391 U.S. 68 (1968), Concerning Human Personhood Under the 14th Amendment.* The Court failed to apply the "live," "human" and "having a being" test of 14th Amendment personhood postulated by it in *Levy v. Louisiana*, 391 U.S. 68 (1968), to the affected unborn children. If a constitutional interpretive decision can be overlooked or disregarded, how can it be maintained that such a decision has "law of the land" ranking? See U.S. Const., Art. VI (Supremacy Clause).

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate at birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the self-same person before birth, only at a different developmental stage. The human genetic code is present at fertilization.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment.* While "liberty" is a broad concept, "life" is the most basic of rights for, without it, all other rights and interests are meaningless. Where was the correlation between "liberty" and the right to destroy unborn life? Or the basis for the "fundamental" ranking of such right? Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Not only was abortion a crime at common law and in Texas, but the legal and

social heritage of this Nation viewed abortion not as a "right" but as a naked wrong. Moreover, the constitution protects the life rights of persons against certain governmental deprivations, and *nowhere* does it give any human being the right to destory the life of another. If the implied rights decisions of this Court were applied properly, the life right of the unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivations of Rights.* The Due Process Clause of the 5th Amendment stood as a bar to this Court's Judgment in *Roe* which endangered the rights of abortion "survivors" and authorized the destruction of a large body of legally cognizable rights of the unborn. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Munn v. Illinois*, 94 U.S. 113, 130 (O.T., 1886).

In Texas, an abortion "survivor" would be a U.S. and Texas Citizen (with extremely minor exceptions) per the Citizenship Clause of the 14th Amendment, U.S. Constitution, and entitled to citizen protections under Article I, Section 19, of the Texas Constitution; a "person" within the protective reach of the Due Process and Equal Protection Clauses of such Amendment; a "person" within the "open courts" provisions of Article I, Section 13, of the Texas Constitution; an "individual" within the protection of the *Texas Penal Code* [See *Tex. Penal Code*, § 1.07(a)(17).]; a "child" under the Texas Family *Code*, § 11.01(1), and the tort law of Texas; and would have the same rights, powers and privileges of a child born in Texas after the normal gestation period (*Tex. Family Code*, § 12.05).[6]

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[6] This Court appeared to be unaware that children might survive abortions. Yet children are born alive after abortions.

(Continued on following page)

Similarly, unborn children are recognized legally and have substantial legal rights in Texas, etc. Since the rights cannot and do not exist *in vacuo*, legal statuses stem therefrom.[7] For example, an unborn child is recognized

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See, e.g., *Showery v. State*, 690 S.W. 2d 689, 694, 695-696 (Tex. App. - El Paso, 1985, pet. dis. rev. ref.). They exist in the most monstrously hostile environment imaginable for a defenseless child - where the "mother" abandons her child, where the abortionist is paid (in most cases) to deliver a dead baby, and where the attendants are employees of the abortionist or the abortion facility.

[7] Under English law, the legal status and rights posture of an unborn child was recognized by a substantial body of law, statutory and case. E.g., 12 Ch. II, c. 24, §§ VIII and IX (1660) (representation by a testamentary guardian, with authority to sue to protect the interests of the unborn child); *Reeve v. Long*, 83 E. Repts. 754 (House of Lords, 1695) (vesting of a remainder interest in real property), as codified in 10 & 11 Wm. III, c. 16 (1699); *Lutterel's Case* (c. 1660), referred to in *Hale v. Hale*, 24 E. Repts. 25, 26 (Ch., 1692) (representation in judicial proceeding and award of an injunction to stay waste of property interests). The unborn child was considered a "Person in rerum Natura" [*Wallis v. Hodson*, 27 E. Repts. 642, 643-644 (Ch., 1740)]; was "in esse, according to the rule of the civil law" [*Millar v. Turner*, 27 E. Repts. 907, 908 (Ch., 1747-1748); had "an existence in the eye of the law" [*Burdet v. Hopegood*, 24 E. Repts. 484 (Ch., 1718)]; and was "living * * * in ventre sa mere" [*Beale v. Beale*, 24 E. Repts. 373 (Ch., 1713)].

On the criminal side, abortion of a live unborn child was an offense at common law [e.g., Blackstone, *Commentaries on the Laws of England*, Vol. I (c. 1765), pp. 129-130, and Vol. IV (c. 1769), p. 198; see III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801], and continued so into the laws of this country [e.g., II *Wharton's Criminal Law* (14th ed., by Charles E. Torcia, 1979), § 250, p. 415; Swift, *A System of*

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under the prenatal tort injury doctrine [*Yandell v. Delgado*, 471 S.W. 2d 569 (S.C. Tex., 1971)]; is entitled to receive a monetary award for the wrongful death of his father [*Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App. - Eastland, 1931), no writ]; is entitled to be represented in judicial proceedings which affect him or her [*McArthur v. Scott, supra*, 113 U.S. at 391-392, 404 (involving unborn children not even in gestation)]; is entitled to have his or her mother undergo a life-saving blood transfusion [*Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537, 538 (S.C.N.J., 1964), *cert. denied*, 337 U.S. 985], or a needed caesarean operation [*Jefferson v. Griffin Spalding Co. Hosp. Authority*, 274 S.E. 2d 457, 459, 460 (S.C. Ga., 1981)]; and is entitled to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* [*Tex. Employers' Ins. Co v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969)]. A remainder interest in real property may vest in an unborn child [*Crisfield v. Storr*, 36 Md. 129, 146 (Ct. App. Md., 1872)]. So too with a

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Laws of the State of Connecticut, Vol. I (1795), pp. 177-178, and Vol. II, p. 299; *Mills v. the Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle*, 83 N.C. 544 (S.C.N.C., 1880)]. "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904).

beneficial interest under a trust [*Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga., 1927)].[8]

8. *Manufacture of the Right of Abortion, Etc.* In *Roe*, this Court violated Article III of the U.S. Constitution by *creating* a constitutional liberty of abortion and by restricting the states of *their* reserved constitutional authorities to legislate in this area of substantial state interest. Cf. *Bowers v. Hardwick, supra*, 478 U.S. 186. This violated also the division of powers concept, as recognized in the 10th Amendment to the Constitution. See *Erie R. Co. v. Tompkins, supra*, 304 U.S. at 77-78, 79-80.

III.

IN THE ALTERNATIVE, THE COURT SHOULD HOLD THIS CASE UNTIL AFTER DISPOSITION OF THE APPEAL IN *WEBSTER V. REPRODUCTIVE HEALTH SERVICES*, NO. 88-605, PROBABLE JURISDICTION NOTED ON JANUARY 9, 1989

If the Court does not grant the within Petition, Petitioners request the Court to hold the same for disposition

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[8] Under Texas statutory law, a suit to terminate the parent/child relationship may be brought after the first trimester of pregnancy (*Tex. Family Code*, § 15.021), and the unborn child is to be represented therein, with exceptions not here pertinent [See *id.*, § 11.10(a).]. Further, children who were unborn at the time of the death of their father or other relation may take, as posthumous children, under the intestate laws of Texas or under the will of their father. See *Tex. Probate Code*, §§ 41(a), 67(b).

until after the Court decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605, probable jurisdiction noted on January 9, 1989, since the Court may decide to reconsider and overrule *Roe* in that case. Petitioners believe that *Webster* extends to the Court an opportunity to do just that, and that the State of Missouri and some Amici Curiae, including the United States through the Office of Solicitor General, are seeking such reconsideration and overrule therein.

If the Court overrules *Roe*, Petitioners submit that that should impact favorably upon their cases *vis-a-vis* the interpretation or application of *Tex. Penal Code*, § 9.33. As shown above, the Court of Appeals not only rejected summarily Petitioners' collateral attack on *Roe*, but was influenced materially by *Roe* in its interpretation or application of Section 9.33.

CONCLUSION

For the reasons and authorities set forth, above, Petitioners submit respectfully that the Petition for a Writ of Certiorari should be granted or, in the alternative, that the Court should hold the Petition for disposition until after the Court decides the appeal in *Webster v. Reproductive Health Services*, No. 88-605, probable jurisdiction noted on January 9, 1989.

Respectfully submitted,

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March, 1989

APPENDIX

OPINION OF THE COURT OF APPEALS
(July 28, 1988)

Affirmed as Modified and Opinion filed July 28, 1988.

(SEAL)

In The
Fourteenth Court of Appeals

NO. B14-87-00362-CR
NO. B14-87-00363-CR
NO. B14-87-00364-CR
NO. B14-87-00365-CR
NO. B14-87-00366-CR
NO. B14-87-00367-CR

JAMES CHRISTIAN BOBO,
DAVID RAY MARSHALL,
MARGARET FALL HARPER,
LEON SPIVEY,
JOHN DALTON WITTE, &
MARJORIE NELSON, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause Nos. 912,864; 912,866;
912,861; 912,862; 912,863; & 912,857

OPINION

This is a trespass case. Appellants, James Christian Bobo, David Ray Marshall, Margaret Fall Harper, Leon Spivey, John Dalton Witte, and Marjorie Nelson, appeal

from judgments of conviction for the offense of misdemeanor criminal trespass. TEX. PENAL CODE ANN. § 30.05 (Vernon Supp. 1988). The jury assessed punishment after finding appellants guilty, as charged in the informations, of having trespassed at the West Loop Clinic, a Harris County pregnancy termination facility. Appellants Nelson, Harper, and Witt (sic) received a ninety day jail sentence, and a $650 fine. Appellants Spivey and Marshall received a one hundred twenty day jail sentence, and a $850 fine. Appellant Bobo received a one hundred eighty day jail sentence, and a $1,000 fine. The trial court probated the sentences for one hundred eighty days, on condition that each appellant perform forty hours of community service and refrain from "trespassing, demonstrating, or picketing" at the clinic, which had changed its location to 607 Schumacher in Harris County. We affirm the judgment of the trial court, as modified.

Appellants raise fourteen points of error. The first eight points question the propriety of the trial court's rulings which resulted in exclusion of evidence the appellants argue is relevant to their claimed justification defenses. Points of error nine, ten, and eleven concern the prosecutor's closing argument. Appellants' twelfth point of error challenges certain conditions of their probation. In point of error thirteen, appellant Marshall argues the trial court erroneously denied his motion for an instructed verdict. In point of error fourteen, the appellants claim their informations did not allege offenses under Texas law.

Appellants' convictions arose from their participation in a demonstration at the West Loop Clinic, then located at 2909 West Loop South. It is undisputed that the clinic

was a licensed medical facility. The clinic consisted of a two main areas: a lobby and waiting area, just inside its front glass doors; and an inner area composed of an office, and at least a dozen other rooms, including procedures rooms. A sliding reception window and a door separated the lobby from the clinic's inner areas. A sign affixed to the glass of the clinic's front lobby door entrance indicated the clinic was not a public place, and that only those who had business with the clinic would be allowed in the waiting room. The record indicates the sign may have been removed at some time during the demonstration.

The record shows that appellants were among a large group of people who rushed into the lobby area of the clinic just before 8 a.m. on September 20, 1986, and stayed there until the police arrested them approximately three and one-half hours later. At trial, several witnesses identified the six appellants as members of the group. Most of the staff and several patients had already arrived at the clinic when appellants Spivey and Marshall chained the two front lobby doors together, and chained themselves to chairs in the waiting room. Appellants Nelson and Harper sat down on the floor, and other members of the group blocked the door to the inner area of the clinic. Many in the group carried chains and wore black armbands. Prior to entering the clinic, appellant Witte blocked the clinic's side emergency entrance by parking his van in front of it.

A female employee arrived at the clinic at around 8:00 a.m. Although the doors had already been chained together she managed to enter the lobby by slipping through a gap between them. Her trial testimony shows

that the sign limiting access to the clinic was still posted on the glass doors when she arrived. She also stated she could not enter the inner area of the clinic because approximately twenty people blocked the door, but that she later managed to gain access to the clinic's inner area by climbing through the reception window. Several other, patients, or friends or relatives of patients, followed her, as did appellant Bobo.

Clinic administrator Evicel Ortega first called the police when she appraised the situation in the lobby and concluded it would be futile to tell the protestors to leave because of their noise. A staff member called police a second time after appellant Bobo climbed through the reception window into the clinic's inner area, but by the time police arrived Bobo had climbed back through the window into the lobby. At around 11:30 a.m., Houston Police Office M.A. Walker and the clinic administrator both entered the lobby and asked all the protestors, including the six appellants, to leave the premises. Ten minutes later, when no one left voluntarily, police arrested the appellants.

In their fourteenth point of error, appellants claim the State's charging instruments failed to allege offenses under Texas law. In each information, the State alleged the appellants did:

> intentionally and knowingly enter and, after receiving notice to depart, remain in a building owned by Evicel Ortega, hereafter styled the Complainant, without the effective consent of the Complainant.

Although they failed to file motions to quash the indictment, appellants now contend the failure of the informations to allege *who* told them to leave amounts to

fundamental error requiring dismissal of the informations. We disagree.

By failing to object to the informations, appellants have waived all but jurisdictional defects. *See* TEX. CODE CRIM. PROC. ANN. art 1.14 (Vernon Supp. 1988); *Thompson v. State*, 697 S.W.2d 413, 415 (Tex. Crim. App. 1985) (en banc); *Green v. State*, 571 S.W.2d 13, 14 (Tex. Crim. App. [Panel Op.] 1978). *Green* defines a jurisdictional defect as one that fails to allege the elements constituting the offense, and thereby renders the indictment insufficient. 571 S.W.2d at 15.[1] In evaluating a claim of fundamental error raised for the first time on appeal, *Thompson* requires this court to construe the entire charging instrument liberally. 697 S.W.2d at 415. Thus, this court will order the informations dismissed only if we conclude, after construing them liberally and in their entirety, that the State failed to allege the essential elements of the offense of criminal trespass. *Thompson*, 697 S.W.2d at 415; *Beck v. State*, 682 S.W.2d 550, 554 (Tex. Crim. App. 1985) (en banc); *Green*, 571 S.W.2d at 15. *See also, Martinez v. State*, No. 1357-85, slip op. (Tex. Crim. App. December 16, 1987, not yet reported) (unless a fact is an essential element of the offense, as opposed to an evidentiary fact, the State need not plead it); *accord*, TEX. CODE CRIM. PROC. ANN. art. 21.03 (Vernon 1966) (charging instrument should state everything the State must prove); TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1966) (requiring clear and certain allegation of commission of offense).

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[1] Pursuant to TEX. CODE CRIM. PROC. ANN. art. 21.23 (Vernon 1966), the same standards govern indictments and informations. *Haecker v. State*, 571 S.W.2d 920, 921 (Tex. Crim. App. [Panel Op.] 1978).

Ordinarily, if the accusation of a charging instrument uses the same or similar language as the statute proscribing the offense, it will suffice to confer jurisdiction on the court and to give the accused adequate notice. TEX. CODE CRIM. PROC. ANN. art. 21.17 (Vernon 1966); *Thompson*, 697 S.W.2d at 415; *Beck*, 682 S.W.2d at 554. Case law construing TEX. PENAL CODE ANN. § 30.05 states that a person commits the offense of criminal trespass if: he knowingly, intentionally, or recklessly, enters or remains on the property or in a building of another; without the effective consent of the owner; when he either had notice that entry was forbidden, or failed to depart after receiving notice to do so. *See Johnson v. State*, 665 S.W.2d 554, 556 (Tex. App. – Houston [1st Dist.] 1984, no pet.), citing *Day v. State*, 532 S.W.2d 302, 305-06 (Tex. Crim. App. 1975). Although § 30.05 (b) (A-C) further define "notice," we are not aware of any authority, either case law construing § 30.05, or provisions of the Code of Criminal Procedure, which would categorically require the State to allege the *means* of notice in order to sufficiently charge the accused. Nor have appellants cited any authority.

Here the information alleged essential elements of § 30.05 (a): intentional and knowing entry; without consent; remaining; after notice to depart (the statutory alternative to notice that entry was forbidden). We hold the information was amply sufficient to charge appellants with criminal trespass for jurisdictional purposes, and reject their fundamental error claim. Appellants' fourteenth point of error is overruled.

In their first eight points of error, appellants challenge pre-trial and trial rulings by the trial court which they argue resulted in an exclusion of evidence relevant

to their claimed justification theories, defense of third persons and necessity, TEX. PENAL CODE ANN. §§ 9.33 & 9.22 (Vernon 1974), respectively. Appellants further contend the court's exclusionary rulings denied them a fair trial, in violation of U.S. CONST. amend. VI, and denied them due process and the due course of law in violation of U.S. CONST. amend. XIV and TEX. CONST. art. I, § 19. We disagree.

Appellants' first three points of error question the propriety of the trial court's granting a motion in limine in favor of the State. The motion indicates the State asked the court to prohibit evidence concerning abortions because the State sought to avoid discussion of the morality of abortion and to limit the trial to the issue of whether a criminal trespass had occurred.

Mere granting of a motion in limine cannot constitute reversible error. *Romo v. State*, 577 S.W.2d 251, 252 (Tex. Crim. App. [Panel Op.] 1979); *Ransom v. State*, 630 S.W.2d 904, 907 (Tex. App. – Amarillo, 1982, no pet.); *cf.*, *Rushton v. State*, 695 S.W.2d 591, 593 (Tex. App. – Corpus Christi, 1985, no pet.). The reason for this often cited rule is that a trial court's limine rulings are subject to reconsideration: the court may not, for example, rely on its having granted such a motion in order to exclude properly admissible evidence. *Norman v. State*, 523 S.W.2d 669, 671 (Tex. Crim. App.), *cert. denied*, 423 U.S. 930 (1975). Further, a trial court's granting a motion in limine in an opponent's favor merely demands that a party seeking to introduce evidence approach the bench for a "definitive" ruling before attempting to put on evidence within the motion's scope. *Rushton*, 695 S.W.2d at 594. In the instant case it would have been preferable if the trial court's order had

included express language reflecting its willingness to reconsider its decision to grant the State's motion in limine by requiring both appellants and the State to approach the bench concerning proffer of evidence pertinent to the motion. However, we cannot say that the failure to include such language constituted error. As *Norman* also teaches, the dispositive question on appeal is not whether the court correctly granted the State's motion in limine. 523 S.W.2d at 671. Rather, the controlling issue is whether the court ultimately ruled properly in excluding the evidence the appellants sought to include. *Id.* Accordingly, we overrule points of error one, two, and three and turn to those points of error which address the court's exclusionary rulings.

In points of error four through eight, appellants claim the trial court unconstitutionally deprived them of a fair trial and denied them due process and due course of law by refusing to permit them to put on evidence they claim is relevant to justification defenses specifically provided for by statute: defense of third persons, TEX. PENAL CODE ANN. § 9.33; and necessity, TEX. PENAL CODE ANN. § 9.22. They question the constitutionality of the court's refusal to instruct the jury concerning those defenses.

We first note that appellants premise their contentions concerning both justification defenses on the purported invalidity of *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court decision which recognized that the constitutional right to privacy encompasses a woman's freedom to decide whether or not to terminate a pregnancy. This court must reject appellant's underlying challenge to *Roe v. Wade*. *See Ex parte Aldridge*, 169 Tex. Cr. 395, 400, 334 S.W.2d 161, 164 (1960); *Brady v. Doe*, 598

S.W.2d 338 (Tex. Civ. App. – Houston [14th Dist.] 1980) (per curiam), *cert. denied*, 449 U.S. 1081 (1981).

For this court to order a reversal of appellants' convictions based on excluded evidence, we must first conclude that because the proffered evidence was relevant, the trial court erred by excluding it. *See Bird v. State*, 692 S.W.2d 65, 73 (Tex. Crim. App.), *cert. denied*, 106 S. Ct. 1238 (1985). Only then may we decide whether the error harmed appellants. *See Id.;* Tex. R. App. P. 81 (b)(2). Moreover, because determination of the relevancy of proffered evidence is a matter committed to the discretion of the trial court, appellants must also demonstrate that the trial court's exclusionary rulings amounted to an abuse of discretion. *See Johnson v. State*, 698 S.W.2d 154, 160 (Tex. Crim. App. 1985) (en banc), *cert. denied*, 107 S.Ct. 239 (1986); *Nubine v. State*, 721 S.W.2d 430, 432 (Tex. App. – Houston [1st Dist.] 1986, pet. ref'd); *Dominguez v. State*, 722 S.W.2d 179, 183 (Tex. App. – Houston [14th Dist.] 1986, no pet.); *see also, Werner v. State*, 711 S.W.2d 639, 643 (Tex. Crim. App. 1986) (en banc) (trial court's determination of admissibility of proffered evidence will not be reversed absent showing of clear abuse of discretion). Evidence is relevant if it tends to render a contested material issue more or less probable. *See*, Tex. R. Crim. Evid. 401; *Garza v. State*, 715 S.W.2d 642, 644 (Tex. Crim. App. 1986) (en banc); *Johnson*, 698 S.W.2d at 160; *Nubine*, 721 S.W.2d at 434.

Appellants preserved the question of the relevancy of their proffered evidence in ten bills of exception. Appellants made their first bill following their cross-examination of the administrator of the clinic, at the close of the state's case-in-chief. In the bill, the administrator

described the procedures performed at the clinic and medical warnings given the patients. Two additional bills by defense witnesses contained testimony tending to show that the demonstration caused them to reflect on the dangers of the clinic's procedures. The remaining bills of exception consisted of testimony by each of the appellants. Generally, each appellant testified that in his or her opinion, the danger to the patients and the unborn created an emergency situation justifying the trespass.

It is axiomatic that a trial court commits no error when it rules to exclude proffered evidence which fails to demonstrate entitlement to a justification defense. *Roy v. State*, 552 S.W.2d 827, 830-31 (Tex. Crim. App. 1977), *overruled on other grounds to the extent of conflict by Johnson v. State*, 650 S.W.2d 414, 416 (Tex. Crim. App. 1983) (en banc); *Hoffart v. State*, 686 S.W.2d 259, 264 (Tex. App. – Houston [14th Dist.] 1985, pet. ref'd), *cert. denied*, 107 S. Ct. 95 (1986). To establish that they were entitled to either the defense of third persons or necessity defenses, appellants' bills of exception must demonstrate that they met all elements of those justification theories. *See Roy*, 552 S.W.2d at 830-31. We conclude appellants' proof failed to make that showing with respect to either defensive theory.

According to TEX. PENAL CODE ANN. § 9.33:

> A person is justified in using force or deadly force against another to protect a third person if:
>
> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the *unlawful* force or *unlawful* deadly force he reasonably

> believes to be threatening the third person he seeks to protect; *and*
>
> (2) the actor reasonbly (sic) believes that his intervention is immediately necessary to protect the third *person* (emphasis added).

Focusing on the "reasonable belief" element of § 9.33, appellants stress their conviction that pregnancy terminations threatened the lives of pregnant mothers and their unborn. We conclude their bills of exception fail to meet two other necessary elements of § 9.33. Since it is undisputed that the clinic was a licensed pregnancy termination facility, nothing in any of the bills could support findings that either the clinic's procedures, or the mothers' seeking the procedures, amounted to *unlawful* force or *unlawful* deadly force. Moreover, with respect to the alleged harm to the unborn, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). Similarly, because TEX. PENAL CODE ANN. § 1.07 (a)(27) defines "person" as "an individual, corporation, or association," while § 1.07 (a)(17) defines "individual" as "a human being who has been born and is alive," an unborn fetus is not a "person" for purposes of the defense of third persons defense. *Ogas v. State*, 655 S.W.2d 322, 325 (Tex. App. – Amarillo, 1983, no pet.). Therefore, there is no showing that appellants could "protect" the unborn fetuses from purported harm from either the clinic staff, or their own mothers, within the meaning of § 9.33.

The necessity defense, codified since 1973 at TEX. PENAL CODE ANN. § 9.22, requires a showing that:

> (1) the actor reasonably believes the conduct is immediately necessary to avoid *imminent* harm;

> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the *harm* sought to be prevented by the law prescribing the conduct; *and*
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear (emphasis added).

We conclude the evidence appellants developed in their bills of exception also fails to support the availability of the necessity defense. As its Practice Commentary recognizes, § 9.33 contemplates a case-by-case balancing in assessing competing harms: the harm the actor perceives and seeks to prevent must "clearly outweigh" the harm which will result from his acting in violation of another law, here TEX. PENAL CODE ANN. § 30.05, the criminal trespass statute. However, what the actor seeks to prevent must first be a harm.

As we have noted, it is undisputed that the clinic was licensed pregnancy termination facility. Nothing in appellants' bills of exception tends to show that the clinic's staff or its patrons were acting other than within the constitutional right of women to terminate their pregnancies recognized in *Roe v. Wade*. While the clinic administrator acknowledged the procedures did involve certain "risks," a suggestion of the possibility of harm will not suffice to support a necessity defense. *See Schermbeck v. State*, 690 S.W.2d 315, 317-18 (Tex. App. – Dallas, 1985, no pet.) Accordingly, the contents of appellants' bills of exceptions do not demonstrate that the "harm" to the clinic's patients or their unborn clearly outweighed the harm caused by their acknowledged trespass at the clinic, as required by § 9.22 (2). Moreover, while appellants again attest to their "reasonable beliefs," as they did in

attempting to raise their § 9.33 theory, nothing they developed in their bills of exceptions suggests that the "harm" they sought to prevent was imminent, as required by § 9.22 (1).

The controlling issue in this case was whether appellants had committed a trespass at the West Loop Clinic. Although appellants maintain their bills of exception raised evidence relevant to their prosecution, nothing in their bills tended to make the State's allegations that a trespass had occurred less probable. *See* TEX. R. CRIM. EVID. 401. Therefore, we hold that the trial court did not abuse its discretion by excluding that proffered evidence on relevancy grounds. TEX. R. CRIM. EVID. 401; *Johnson*, 698 S.W.2d at 160; *Hoffart*, 686 S.W.2d at 263. Because determination of the relevancy of excluded evidence is the threshold issue in our analysis of appellants' points of error challenging exclusion of evidence, we need not decide whether exclusion of their proffered evidence harmed the appellants. *Bird*, 692 S.W.2d at 73.

We hold that the contents of appellants' bills of exception are irrelevant to the appellants' criminal trespass proceeding, and do not give rise to a fact issue that either § 9.22 or § 9.33 justified the appellants' trespass. In addition, since the evidence did not raise either defensive theory, the trial court properly refused to charge the jury on those defenses. *Sanders v. State*, 707 S.W.2d 78, 80 (Tex. Crim. App. 1986) (en banc); *Brooks v. State*, 642 S.W.2d 791, 799 (Tex. Crim. App. [Panel Op.] 1982). Finding nothing to support appellants' contentions that the trial court's exclusionary rulings unconstitutionally deprived them of a fair trial, due process or due course of law, we overrule points of error four through eight.

Appellants' ninth, tenth, and eleventh points of error concern the prosecutor's closing arguments to the jury. In point of error nine, appellants contend the trial court erred by permitting the prosecutor to refer to a chart during his closing argument. Appellants describe the chart, which is not part of the record on appeal, as a listing of the names of prosecution witnesses beneath the appellants' surnames. While appellants contend the chart was not introduced into evidence, the statement of facts shows that the prosecutor displayed and referred to the chart during the entire trial, and that appellants requested that the chart be marked as State's Exhibit Nine after they objected to its use.

The prosecutor referred to the chart as his "summary" on the issue of appellants' identification. In the absence of the chart itself, the record before us indicates it is only that, particularly since the prosecutor invited the jurors to compare his chart's summary of the evidence with their own recollections, and to reject the chart if they found a discrepancy between the two. Texas law recognizes summation of the evidence as one of four proper jury argument areas. *See Landry v. State*, 706 S.W.2d 105, 111 (Tex. Crim. App. 1985) (en banc), *cert. denied*, 107 S. Ct. 242 (1986). Moreover, a trial court does not abuse its discretion when it permits summary of evidence by means of a visual aid. *Vera v. State*, 709 S.W.2d 681, 687 (Tex. App. – San Antonio, 1986, pet. ref'd). Appellants' ninth point of error is overruled.

In point of error ten, appellants complain of two remarks by the prosecutor. In each instance the trial court overruled appellants' objection, admonished the jurors to

disregard the prosecutor's remarks, and denied appellants' motion for a mistrial, thereby laying the necessary predicate to our review. *See Stephens v. State*, 671 S.W.2d 517, 521 (Tex. Crim. App. 1984) (en banc); *Brooks v. State*, 642 S.W.2d 791, 798 (Tex. Crim. App. [Panel Op.] 1982).

Appellants first complain of the prosecutor's stating that on the date in question "a whole bunch of people decided they were going to storm this building, and you have got six of them here today." Appellants maintain the trial court should have granted their motion for a mistrial because the remark created an inflammatory suggestion of conspiracy not raised by the allegations in their informations. We disagree. We hold the comment was a reasonable deduction from evidence adduced at trial, one of the four permissible areas of jury argument. *See Landry*, 706 S.W.2d at 111. The record supports the inference that appellants were among a large, noisy group of protestors who carried out a joint trespass plan.

Immediately after the trial court denied appellants a mistrial based on his preceding remark, the prosecutor apologized to the jury, but added that he "didn't realize [he] was that frightening to the defense attorney." The prosecutor's second remark was improper, in that it did not fall within one of the four areas of proper jury argument set out in *Landry*, 706 S.W.2d at 111. Although the trial court denied a mistrial, it did instruct the jury to disregard the prosecutor's remark. Because the prosecutor directed his improper remark to the appellants' counsel, rather than to the appellants themselves, he fell short of injecting into his argument new facts that were harmful to the accused. *Todd v. State*, 598 S.W.2d 286, 297 (Tex. Crim. App. [Panel Op.] 1980).

Finally, because neither of the prosecutor's comments was of such an inflammatory nature that the trial court's instructions to disregard could not have reasonably cured their alleged prejudicial effect, appellants have failed to show reversible error. *Johnson v. State*, 611 S.W.2d 649 (Tex. Crim. App. [Panel Op.] 1981). Appellants' tenth point of error is overruled.

In their eleventh point of error, appellants point to portions of the prosecutor's closing argument to which they did not object during trial. They now argue the prosecutor urged the jury to convict them on a theory of "notice to depart" which the State had not alleged in their informations. They maintain the trial court committed fundamental error when it failed to correct the prosecutor on its own motion. We disagree. The failure to object results in a waiver of alleged jury argument error. *See Drew v. State*, 743 S.W.2d 207, 218-21 (Tex. Crim. App. 1987) (en banc); *cf., Green v. State*, 682 S.W.2d 271, 295 (Tex. Crim. App. 1984) (en banc), *cert. denied*, 470 U.S. 1034 (1985) (unless the argument is so prejudicial that no instruction to disregard could have cured its alleged harm, failure to object results in a waiver of purported error).

Notwithstanding their failure to object to this last purported error in jury argument, we have reviewed the merits of appellants' contentions in the interest of justice. Appellants contend that by referring tot he sign affixed to the clinic's lobby doors as satisfying notice for purposes of a criminal trespass conviction, in addition to the administrator's notice to depart alleged in the informations, the prosecutor authorized the jury to convict them on a theory not alleged by the State. We disagree. Rather,

we conclude the argument was a reasonable deduction from evidence concerning the restricted entry sign developed during trial. *See Landry*, 706 S.W.2d at 111. The argument merely conforms to two of the statutory definition (sic) of notice set out at TEX. PENAL CODE ANN. § 30.05 (b)(2). The court included these definitions in its charge, to which appellants objected, but on different grounds. Because the argument conformed to the court's charge, no reversible error is shown. *See Maudlin v. State*, 628 S.W.2d 793, 795 (Tex. Crim. App. [Panel Op.] 1982). Moreover, we cannot say there is a reasonable possibility that the prosecutor's reference to the sign contributed to the conviction. *Drew*, 743 S.W.2d at 222. Appellants' eleventh point of error is overruled.

The thirteenth point of error raises the contention that the trial court erred by failing to render an instructed verdict in appellant Marshall's case, Cause No. 912,866. While appellants acknowledge that Marshall "voluntarily disabled" himself by chaining himself to a chair, they claim the evidence fails to show he received notice to depart after he was freed from his chains. We hold that appellants waived any possible error based on this contention by proceeding to put on their defense after the State rested. *Kuykendall v. State*, 609 S.W.2d 791, 794 (Tex. Crim. App. [Panel Op.] 1980); *Springer v. State*, 721 S.W.2d 510, 512 (Tex. App. – Houston [14th Dist.] 1986, pet. ref'd); *Martin v. State*, 704 S.W.2d 892, 893 (Tex. App. – Houston [14th Dist.] 1986, no pet.). Appellants' thirteenth point of error is overruled.

In their twelfth point of error, appellants question the trial court's requiring them to refrain from "picketing and demonstrating" at the clinic's new location as a condition

of their probation. We conclude the trial court did not comply with the provisions of TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3a (b) (Vernon Supp. 1988) when it imposed those conditions of probation.

The court responded to the jury's recommendation when it ordered the appellants' sentence probated. Article 42.12 § 3a (b) states in pertinent part:

> If probation is granted by the jury in a misdemeanor case, the court may impose *only* those conditions which are set out in Section 6, 6a, or 6b hereof. The court may impose any one or all of those conditions (emphasis added).

See also, Tamez v. State, 534 S.W.2d 686, 691 n.5 (Tex. Crim. App. 1976) (contrasting permissible range of "reasonable" conditions of probation in a felony case from those available in misdemeanor case when jury recommends probation); *cf., Chacon v. State*, 558 S.W.2d 874, 875 (Tex. Crim. App. 1977) (reciting rule governing conditions of probation in a felony case, where court may impose "reasonable" conditions of probation in addition to those enumerated in TEX. CODE CRIM. PROC ANN. art. 42.12 § 6).

Because the Code of Criminal Procedure empowers a trial court to demand that a probationer commit no violations of the law, it properly conditioned appellants' probation on a requirement that they not trespass at the clinic's new location. TEX. CODE CRIM. PROC. ANN. art 42.12 § 6 (a)(1); *Hoffart*, 686 S.W.2d at 264. But because picketing and demonstrating do not amount to violations of the laws of this State or the United States, and are therefore without the scope of Article 42.12 § 6, we hold that the trial court exceeded its statutory powers in ordering

those conditions of probation. Having reached this conclusion, we need not address the constitutional claims appellants developed in arguing this point of error.

Accordingly, we modify the judgment by deleting the words "demonstrating or picketing" from the conditions of probation. As modified, the judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed July 28, 1988.

Panel consists of Justices Murphy, Draughn, and Ellis.

Publish. TEX. R. APP. P. 90.

JULY 28, 1988.

(SEAL)

JUDGMENT

The Fourteenth Court of Appeals

JAMES CHRISTIAN BOBO, DAVID RAY MARSHALL, MARGARET FALL HARPER, LEON SPIVEY, JOHN DALTON WITTE, & MARJORIE NELSON, APPELLANTS

NO. B14-87-00362-CR
NO. B14-87-00363-CR
NO. B14-87-00364-CR
NO. B14-87-00365-CR V.
NO. B14-87-00366-CR
NO. B14-87-00367-CR

THE STATE OF TEXAS, APPELLEE

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, it is the opinion of this Court that there was no error in the judgment requiring reversal, but there was error in the judgment as entered which is capable of reformation by this Court. Therefore, the judgment is reformed by deleting the words "demonstrating or picketing" from the Conditions of Probation.

It is ordered by the Court that the judgment be in all things affirmed as reformed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

LETTERS FROM COURT OF APPEALS
ADVISING OF THE OVERRULING
OF MOTIONS FOR REHEARING
(September 22, 1988)

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

MARY JANE SMART
CLERK

HELEN A. CASSIDY
STAFF ATTORNEY

PHONE
713-655-2800

September 22, 1988

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00362-CR
CASE NO. 912864

TRIAL COURT

STYLE: Bobo, James Christian
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
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GEORGE T. ELLIS
JUSTICES

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713-655-2800

September 22, 1988

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00363-CR TRIAL COURT
CASE NO. 912866

STYLE: Marshall, David Ray
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
CHIEF JUSTICE

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GEORGE T. ELLIS
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MARY JANE SMART
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September 22, 1988

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00364-CR TRIAL COURT
CASE NO. 912861

STYLE: Harper, Margaret Fall
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK

By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
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JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

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HELEN A. CASSIDY
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PHONE
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September 22, 1988

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00365-CR
CASE NO. 912862

TRIAL COURT

STYLE: Spivey, Leon
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
CHIEF JUSTICE

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SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
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GEORGE T. ELLIS
JUSTICES

MARY JANE SMART
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September 22, 1988

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00366-CR TRIAL COURT
CASE NO. 912863

STYLE: Witte, John Dalton
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
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PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

MARY JANE SMART
CLERK

HELEN A. CASSIDY
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PHONE
713-655-2800

September 22, 1988

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00367-CR TRIAL COURT CASE NO. 912857

STYLE: Nelson, Marjorie
V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

OFFICIAL NOTICES FROM COURT OF
CRIMINAL APPEALS REFUSING PETITIONS
FOR DISCRETIONARY REVIEW
(December 21, 1988)

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) December 21, 1988
RE: Case No. 1183-88 COA#: 14-87-00362-CR
STYLE: Bobo, James Christian

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) December 21, 1988
RE: Case No. 1184-88 COA#: 14-87-00363-CR
STYLE: Marshall, David Ray

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Richard W. Schmude
MAIL TO: P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) December 21, 1988
RE: Case No. 1185-88 COA#: 14-87-00364-CR
STYLE: Harper, Margaret Fall

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Richard W. Schmude
MAIL TO: P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) December 21, 1988
RE: Case No. 1186-88 COA#: 14-87-00365-CR
STYLE: Spivey, Leon

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Richard W. Schmude
MAIL TO: P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) December 21, 1988
RE: Case No. 1187-88 COA#: 14-87-00366-CR
STYLE: Witte, John Dalton

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) December 21, 1988
RE: Case No. 1188-88 COA#: 14-87-00367-CR
STYLE: Nelson, Marjorie

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICES FROM COURT OF CRIMINAL APPEALS DENYING MOTIONS FOR REHEARING (January 18, 1989)

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

(Seal) January 18, 1989

RE: Case No. 1183-88 COA#: 14-87-00362-CR
STYLE: Bobo, James Christian

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

(Seal) January 18, 1989

RE: Case No. 1184-88 COA#: 14-87-00363-CR
STYLE: Marshall, David Ray

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Richard W. Schmude
MAIL TO: P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) January 18, 1989
RE: Case No. 1185-88 COA#: 14-87-00364-CR
STYLE: Harper, Margaret Fall

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Richard W. Schmude
MAIL TO: P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
(Seal) January 18, 1989
RE: Case No. 1186-88 COA#: 14-87-00365-CR
STYLE: Spivey, Leon

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Richard W. Schmude
MAIL TO: P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

(Seal) January 18, 1989

RE: Case No. 1187-88 COA#: 14-87-00366-CR
STYLE: Witte, John Dalton

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

(Seal) January 18, 1989

RE: Case No. 1188-88 COA#: 14-87-00367-CR
STYLE: Nelson, Marjorie

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: Richard W. Schmude
P. O. Box 674
Tomball, TX 77375